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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and eleven (11) copies of its opposition to a petition for leave to amend filed by Wilburn Industries, Inc. on July 14, 1994.

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 
Stephen T. Yelverton

Enclosure

B:CATON.148

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUL 22 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of:

DAVID A. RINGER

et al.,

Applications for Construction
Permit for a New FM Station,
Channel 280A, Westerville,
Ohio

)
)
) MM Docket No. 93-107

)
) File Nos. BPH-911230MA

)
) through

)
) BPH-911231MB
)

To: The Review Board

OPPOSITION TO WII PETITION FOR LEAVE TO AMEND

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By: _____
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July 22, 1994

B:CATON.148

OPPOSITION TO WII PETITION FOR LEAVE TO AMEND

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.294 (b) of the Commission's Rules, hereby submits this opposition to petition for leave to amend. On July 14, 1994, Wilburn Industries, Inc. ("WII") filed a "Petition for Leave to Amend" and related amendment. In opposition, ORA offers the following comments.

In its petition for leave to amend, WII seeks to amend its application to specify a new transmitter site and to provide the required engineering data. In an amendment, dated April 13, 1994, WII reported that the tower site specified in its application had been sold. Although WII received a letter, dated March 2, 1994, from the tower site owner stating that the site had been sold, WII never informed the Commission when the site was sold or when it first became aware of the sale.

ORA opposes acceptance of the July 14, 1994, amendment of WII until it informs the Commission as to when the initially specified tower site was sold and when it first became aware of that sale. Such information is required to be submitted in order to determine whether WII timely reported the loss of its tower site within thirty (30) days, pursuant to Section 1.65, and also whether it has acted with "due diligence" in obtaining "reasonable assurance" for the new tower site. Imagists, 8 FCC Rcd 2763, 2765, para. 14 (1993), applicants should submit curative amendments no more than 30 days after they learn or should have learned of the need for an amendment and should explain and document any delays beyond 30 days.

WII has simply failed to provide sufficient information about the sale of its former proposed tower site in order for the Commission to make an informed determination as to whether "good cause" has been demonstrated. See also, Capitol City Broadcasting Co., 6

FCC Rcd 5525 (Rev. Bd. 1991), rev. denied, 7 FCC Rcd 2629, para. 4, n. 2 (1992), amendment rejected where applicant failed to document claim of "good cause." If the amendment of WII is rejected, its application is subject to immediate dismissal with prejudice from this proceeding. See, Shablom Broadcasting, Inc., 93 FCC2d 1027, 53 RR2d 1203 (Rev. Bd. 1983), aff'd mem. sub nom., Royce International Broadcasting v. FCC, 762 F.2d 138 (D.C. Cir. 1985), cert. denied, 474 U.S. 945 (1985).

In its July 14, 1994, amendment, WII attempts to blame its over four month delay in filing a tower site amendment on the need to obtain a bank loan to cover the increased costs resulting from the new tower site location. However, WII fails to provide any details or specificity as to when it first approached a bank about a loan and what factors and circumstances caused the delay in obtaining the loan. Until this information is provided, the amendment of WII must not be accepted. Broad conclusory generalizations about the need for a bank loan are woefully insufficient for WII to meet its burden of demonstrating "due diligence." Imagists; Capitol City Broadcasting Co., id., documentation of claims is required to support acceptance of amendment. See, Neil I. Saunders, 102 FCC2d 865 (Rev. Bd. 1985), rejection of amendment required where it is shown that applicant procrastinated in taking steps to amend.

WII failed to even provide a copy of the bank loan letter which supposedly caused the delay in submitting an amendment. Under established Commission precedent, a post-designation amendment can not be accepted if acceptance would require the specification of new issues and require additional hearings. See, Section 73.3522(b); Erwin O'Connor Broadcasting Co., 22 FCC2d 142, 143 (Rev. Bd. 1970).

Until this bank letter is provided (and also current financial statements of WII's principals and the revised cost estimates), it can not be determined if WII is now financially qualified and that its financial re-certification in the July 14, 1994, amendment is valid and thus whether additional hearings would be required. Imagists; Capitol City Broadcasting Co., id., documentation of claims is required to support acceptance of amendment. See also, Pontchartrain Broadcasting Co., Inc. v. FCC, Case No. 93-1291, p. 5, decided Feb. 11, 1994, an amended financial proposal must be fully evaluated by the Commission.

The amendment of WII must be rejected on another basis. The March 2, 1994, letter submitted in WII's April 13, 1994, amendment indicates that it never had "reasonable assurance" of its former proposed tower site. See, ORA's April 21, 1994, motion to enlarge the issues. The March 2, 1994, letter states in pertinent part that the tower site owner had only been "willing to negotiate" with WII a "possible" lease of the tower site. However, a mere possibility that a site will be available is not sufficient. William F. and Anne K. Wallace, 49 FCC2d 1424, 1427 (Rev. Bd. 1974); National Communications Industries, 6 FCC Rcd 1978, 1979, para. 9 (Rev. Bd. 1991), aff'd, 7 FCC Rcd 1703 (1992). More than a vague "willingness to deal" is needed to constitute "reasonable assurance." Progressive Communications, Inc., 3 FCC Rcd 5758, 5759, para. 9 (Rev. Bd. 1988). See also, ORA's exceptions, paras. 82-84, filed December 20, 1993.

It is axiomatic that an applicant must have "reasonable assurance" of the availability of its proposed tower site at the time of initially filing its application. Rem Malloy, 6 FCC Rcd 5843, 5846, para. 15 (Rev. Bd. 1991); Adlai E. Stevenson IV, 5 FCC Rcd 1588, 1589, para. 7 (Rev. Bd. 1990); Radio Delaware Inc., 4 FCC Rcd 8630, 8631, para. 9 (Rev. Bd.

1989). Accordingly, unless WII demonstrates that it had "reasonable assurance" of its former proposed tower site at the time of initially filing its application, a new tower site can not be approved. Colorado Television, Inc., 98 FCC2d 513, 518, n. 6, 56 RR2d 1080 (Rev. Bd. 1984), rejection of initially specified tower site requires rejection of amended tower site because the chain of "good cause" has long been broken.

The application of WII is subject to dismissal because it initially specified a short-spaced tower site. North Texas Media, Inc. v. FCC, 778 F.2d 28, 34 (D.C. Cir. 1985); Eugene Walton, 6 FCC Rcd 6071, 6073-6075, paras. 11-17 (Rev. Bd. 1991), rev. denied, 7 FCC Rcd 3237 (1992); Imagists, paras. 7-9. See also, ORA's pre-designation petition to deny and dismiss, filed March 26, 1992. The Hearing Designation Order, 8 FCC Rcd 2651 (MMB 1993) declined to dismiss the application of WII. However, ORA intends to appeal this matter to the Commission at the time for filing applications for review. See, Section 1.115 (e)(3).

WII can not now be allowed to circumvent and evade this short-spacing issue because of the fortuitous circumstance that the short-spaced tower site was sold after the issue was first raised by ORA. Imagists, para. 11, the time and expense that an applicant devotes to preparing for litigation based upon an opponent's initial proposal is forfeited if that proposal is allowed to be amended and thus would result in a waste of public and private resources. Accordingly, if the amendment of WII is accepted, it must be subject to and conditioned upon the ultimate resolution of the short-spacing issue raised by ORA.


In the July 14, 1994, petition for leave, WII contends that acceptance of the amendment would not result in a comparative upgrade because of the mootness of the

comparative criteria. However, WII overlooks that only integration, and not comparative signal coverage, is affected by Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993). Acceptance of WII's amendment would allow it to substantially increase its signal coverage. It initially proposed only 3 kw facilities and now proposes 6 kw. Accordingly, if the amendment is accepted, WII must be frozen as to its initially proposed signal coverage. See, Nugget Broadcasting Co., 8 FCC Rcd 7121, para. 3 (1993).

WHEREFORE, in view of the foregoing, the Review Board is requested to deny the petition for leave to amend filed by WII and to reject its tower site amendment. WII has utterly failed to document its claim of "due diligence" and "good cause."

Respectfully submitted,

McNAIR & SANFORD, P.A.

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July 22, 1994

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CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 22nd day of July, 1994, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Opposition to WII Petition for Leave to Amend" to the following:

Joseph A. Marino, Chairman*
Review Board
Federal Communications Commission
2000 L Street, N.W., Room 211
Washington, D.C. 20554

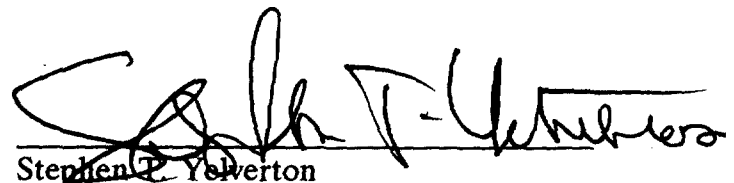
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